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In the

Supreme Court of the United States

October Term, 1960

No. [redacted]

UNITED STATES OF AMERICA, PETITIONER,

v.

NEW AND REAL, CLAIMANT OF ONE DIAMOND RING, ETC.,
CONSISTING WITH MOTION, ETC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH
CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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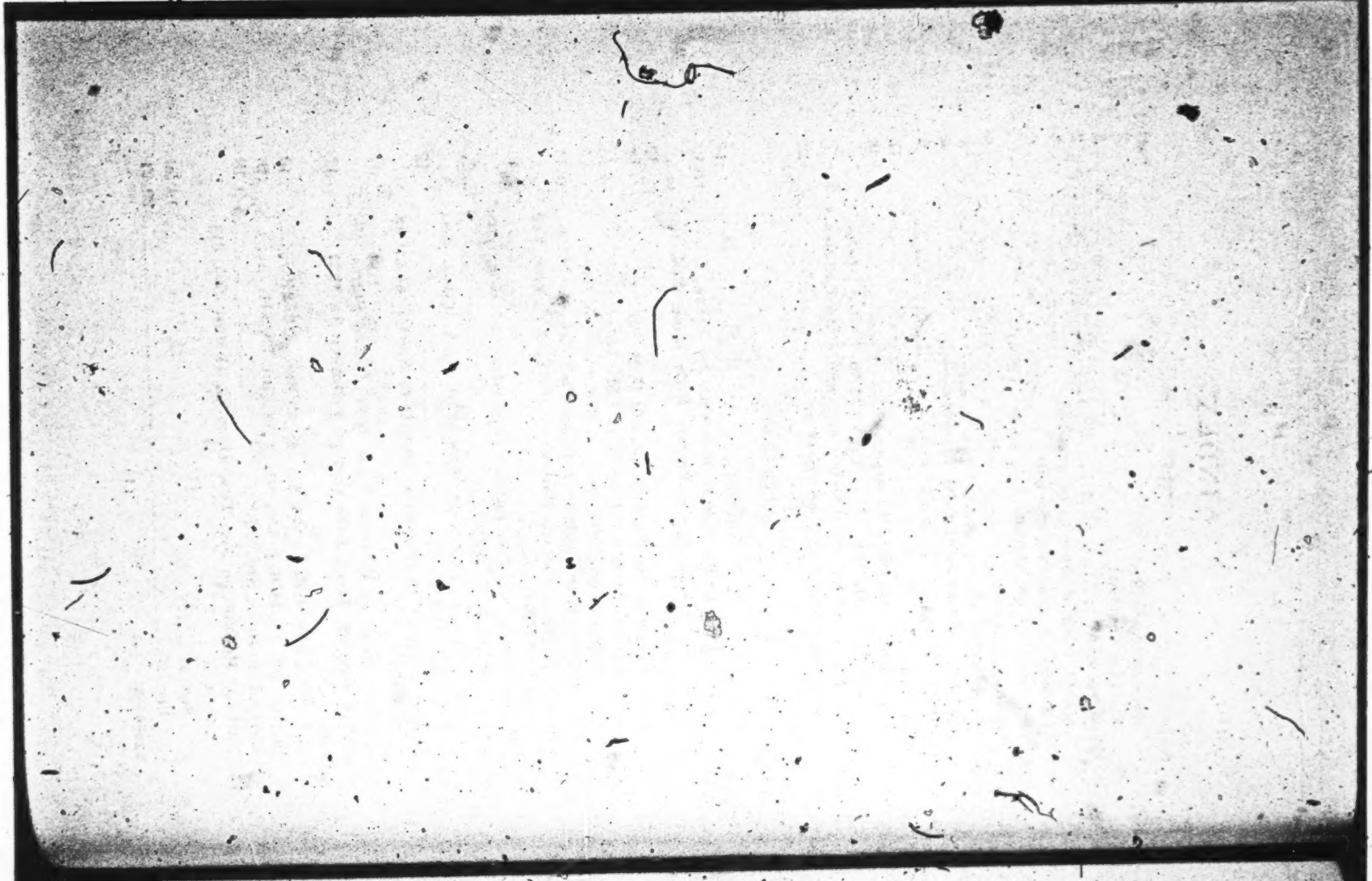

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD RYAN, CLAIMANT OF ONE BRUNSWICK BAR, COMPLETE WITH MIRRORS, ETC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Ninth Circuit, entered November 17, 1930 (R. 61), reversing a decree of the District Court for the District of Montana (R. 22–23) declaring a forfeiture of certain property under Section 3453 of the Revised Statutes.

QUESTION PRESENTED

Whether Section 3453 of the Revised Statutes provides for the forfeiture of all personal property found in a place where articles subject to tax are possessed for the purpose of being *sold or removed* in fraud of the internal revenue laws or with design to avoid payment of such tax, or whether that statute provides for the forfeiture of such personal property only which is found in a place where articles subject to tax are *manufactured* for such fraudulent purpose or with design to avoid payment of tax.

STATUTES INVOLVED

These are set forth in Appendix A, pp. 18–21, *infra*.

STATEMENT

On March 21, 1930, a libel was filed by the United States in the District Court praying the forfeiture of a bar, back bar, and other saloon furnishings and equipment, alleged to have been seized by Federal prohibition agents in a soft-drink parlor operated by one George Lewis in Butte, Montana, and then held by the Federal Prohibition Administrator for that district. (R. 1–3.) The libel averred that at the time of the seizure—

> the defendant George Lewis * * * within the premises hereinabove described, did then and there * * * have in his possession and * * * control certain goods, * * *

to wit, whiskey, beer and gin, a more particular description of which is to your informant unknown, * * * which said intoxicating liquors were goods and commodities for and in respect whereof a tax was then and there due and unpaid, which said intoxicating liquors were then and there in the possession, custody and control of said defendant for the purpose of being sold or removed by him in fraud of the internal revenue laws of the United States of America and with the design to avoid the payment of said taxes * * *.

Ryan, the respondent here, appeared as claimant and filed an answer in which he asserted that the property libeled had been seized upon a search warrant issued under the National Prohibition Act; that in the execution of said warrant certain whiskey, beer, and gin, as well as the containers thereof, had been seized as authorized by the National Prohibition Act; that in addition thereto the officers executing said warrant, acting in excess of the powers conferred upon them by the National Prohibition Act and by the warrant, seized the property described in the libel; that none of the libeled property was designed for the manufacture of intoxicating liquor or intended for use in violating the National Prohibition Act, and that at the time of its seizure the claimant was, and still is, the owner of such property and entitled to the immediate possession thereof. The answer denied that

any part of the libeled property was subject to forfeiture for any violation of the internal revenue laws. (R. 9–15.)

Issue was joined on these pleadings. The evidence clearly established that on February 24, 1930, the date of the seizure, tax-unpaid liquor was held for sale and was being sold by the libellee, George Lewis, on the premises where the libeled property was seized. The libeled property was seized in the room occupied by Lewis for the sale of the liquor and was used by Lewis as ancillary to such sale. (R. 24–26, 27–32.)

The claimant introduced in evidence the record of criminal proceedings against George Lewis showing that the latter had been indicted for the possession of intoxicating liquor and the maintenance of a common nuisance in violation of the National Prohibition Act on the premises in question on February 24, 1930, when the property libeled was seized, and that upon being called for arraignment, Lewis had failed to appear. (R. 32, 36–37.) The claimant testified that he was the owner of the libeled property at the time it was seized; that he was not the owner of the premises and had no interest therein; and that Lewis had rented the furniture from the witness. (R. 40–41.)

Both sides having moved for a directed verdict at the close of all the testimony, counsel, at the suggestion of the court, entered into an agreement pursuant to which the jury was dismissed and the issues left for the determination of the court. (R.

42–43.) The District Court held (1) that Section 3453 of the Revised Statutes provides for the forfeiture of all personal property in any building or inclosure where articles subject to an internal revenue tax are possessed for the purpose of being sold with design to avoid payment of the tax, and (2) that there was no such direct conflict between Section 3453 of the Revised Statutes and Sections 22 and 25 of the National Prohibition Act as to effect an implied repeal of Section 3453. (R. 18–20.) A decree for the libelant was accordingly entered. (R. 22–23.)

Upon appeal the decree was reversed by the Circuit Court of Appeals (R. 58–61) on the sole ground that the District Court erred in construing Section 3453 as providing for the forfeiture of all personal property found in a place where articles subject to tax are possessed for the purpose of being *sold* with design to avoid payment of such tax, the appellate court holding that, except for articles subject to tax and raw materials intended to be manufactured into such articles, the only personal property which is forfeitable under Section 3453 is that found in a place where articles subject to tax are *manufactured*.

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that Section 3453 of the Revised Statutes does not provide for a forfeiture of personal property, other than articles subject to tax, which is found in a

place where articles subject to tax are possessed for the purpose of being sold or removed in fraud of the internal revenue laws, or with design to avoid payment of such tax.

REASONS FOR GRANTING THE WRIT

The decision of the Circuit Court of Appeals for the Ninth Circuit in this case is in direct conflict with that rendered on April 6, 1931, by the Circuit Court of Appeals for the Second Circuit in *United States* v. *10 Bottles of Scotch Whiskey, etc.*, the opinion in which case is set out in full in Appendix B, pp. 22-27, *infra*. A large number of suits have been instituted by the Government under Section 3453 to forfeit the furnishings and equipment of saloons, cabarets, and other places where intoxicating liquors have been kept *for sale and sold* with design to evade the payment of the taxes thereon. In some of these cases the libels have been sustained and forfeiture decreed by the district courts; in others, the district courts have held that the only personal property, other than the taxed articles themselves, which is forfeitable under Section 3453 is that found in places where such taxed articles are *manufactured*. This divergence of decision has now extended to the circuit courts of appeals. An authoritative ruling by this Court is necessary to settle the conflict of decisions thus prevailing in the lower Federal courts and to enable the Government to determine its future action in the ad-

ministration of the internal revenue laws and the National Prohibition Act.

Wherefore it is respectfully submitted that this petition for certiorari to review the decree of the Circuit Court of Appeals in the above-entitled cause should be granted.

THOMAS D. THACHER,
Solicitor General.

APRIL, 1931.

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BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the District Court (R. 18) has not been reported. The opinion of the Circuit Court of Appeals (R. 58–61) is reported in 44 F. (2d) 951.

JURISDICTION

The decree of the Circuit Court of Appeals was entered November 17, 1930. (R. 61.) On February 16, 1931, the time for filing a petition for certiorari was, upon application of the Government, extended for a period of sixty days from that date. The jurisdiction of this Court to issue the writ applied for is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED, STATUTES INVOLVED, ETC.

A statement of the question presented, statutes involved, and assignment of error relied upon, as well as a statement of the case, will be found in the petition.

ARGUMENT

THE CIRCUIT COURT OF APPEALS ERRED IN ITS CONSTRUCTION OF SECTION 3453 OF THE REVISED STATUTES

Section 3453 of the Revised Statutes (*infra*, p. 18) provides for the forfeiture of three classes of property, viz:

(1) "*All* goods, wares, merchandise, *articles,* or objects, *on which taxes are imposed,* which shall be found in the possession, or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of said taxes";

(2) "all *raw materials* found in the possession of any person intending to manufacture the same into *articles of a kind subject to tax* for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax"; and

(3) "all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure where *such articles* or *raw materials* are found." (Italics ours.)

The Circuit Court of Appeals treated the words "such articles," contained in the third clause, as referring only to articles mentioned in the second clause, that is, those *manufactured* from raw materials, whereas the District Court treated the words "such articles" as referring also to the articles mentioned in the first clause, *i. e.,* taxed articles as being found in possession of a person for the purpose of being *sold or removed* in fraud of the internal revenue laws. The Circuit Court of Appeals accordingly held that since the personal property sought to be forfeited in the instant case was not found in a place where articles subject to tax were manufactured from raw materials, such prop-

erty was not forfeitable. We submit that this construction of the statute is erroneous.

Section 3453 was a reenactment of the provisions of Section 9 of the Act of July 13, 1866, c. 184, 14 Stat. 98, 111, amending Section 48 of the Act of June 30, 1864, c. 173, 13 Stat. 223, 240. In the Act of 1864 the first two of the above classes of forfeitable property were defined in substantially the same language as in Section 3453. The third class was described in that Act as follows:

> * * * all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or enclosure where such articles *on which duties are imposed, as aforesaid, and intended to be used by them in the fraudulent manufacture of such raw materials,* shall be found. * * * (Italics ours.)

The amendment of 1866 omitted the italicized words and inserted the words "or raw materials" immediately following the words "such articles," so that the description of this class of property conformed to that subsequently given it in Section 3453, except that the final words "shall be found" were carried into the revision as "are found." Commenting upon the effect of this legislation, District Judge Blatchford in *United States* v. *Quantity of Tobacco*, Fed. Cas. No. 16106, decided in 1872, said (p. 654):

> A reading of the 48th section, giving the usual accepted meaning to the words found therein, seems to me to lead conclusively to

the view that congress intended to forfeit taxable articles when held, especially by their manufacturer, *for the purpose of being sold or removed in fraud of the revenue laws*, or with design to avoid the payment of the taxes which would accrue thereon by reason of such sale or removal; and also to forfeit all raw materials when held by a person intending to manufacture them into taxable articles for the purpose of fraudulently selling such articles, or with design to evade the payment of the taxes which would accrue thereon when sold or removed, and also to forfeit *all personal property found in the place where any such articles*, or any such raw materials, are found; and that possession, with the specified purpose, design or intent, is all that is necessary to work the forfeiture. * * *

* * * The section was amended by the act of July 13, 1866, to read as before recited, *being made more stringent as respected personal property, so as to cover all personal property found in the same place with either the articles or the raw materials, and without reference to the intended use of such personal property.* (Italics ours.)

Similar views were expressed by the same judge in *Quantity of Distilled Spirits*, Fed. Cas. No. 11494, decided in 1868. With reference to a forfeiture sought under Section 48, as amended by the Act of 1866, he there said (p. 1160):

If these spirits, at the time of this seizure, on the 14th day of February, 1868, were

> found on the place, in the possession or custody, or within the control, of any person or persons, for the purpose of being sold or removed by such person or persons in fraud of the internal revenue laws, or with design to avoid the payment of the tax, then, not only are the spirits forfeitable under this section, but also all tools, implements, instruments, and personal property whatsoever, in the place or building where the spirits were found.

And again (p. 111):

> If there were any spirits there, which these parties purposed to sell or remove in fraud of the law, or with design to avoid the payment of the tax, the spirits, and everything in the establishment, are forfeited.

See also *United States* v. *Eighteen Barrels High Wines,* Fed. Cas. No. 15033; *United States* v. *Thirty-six Barrels of High Wines,* Fed. Cas. No. 16468 (p. 70). Cf. *United States* v. *Thirty-three Barrels of Spirits,* Fed. Cas. No. 16470 (1868).

In *United States* v. *Sixteen Barrels of Distilled Spirits,* Fed. Cas. No. 16300 (1879), District Judge Choate held the statute, then Section 3453 of the Revised Statutes, to have the effect earlier given it by Judge Blatchford in the cases above cited. In that case it was said:

> The argument of the claimant is that the words "articles or raw materials" do not refer to the words "all goods, wares, mer-

chandise, articles or objects," but only to the words "all raw materials found in the possession of any person intending to manufacture the same into articles." But the proper antecedent of the words "such articles" is the words "all goods, wares, merchandize, articles and objects." These things before enumerated are here described under the general term "articles." There is no other sensible construction of the language nor anything else to which the term "such articles" can be held to refer with any regard to the grammatical meaning of the words. The words refer to something before mentioned in the section and are called articles as being "found" in the place. They can not refer, therefore, to "articles" which might be in the future manufactured out of the raw materials found in the place, but which are not now found there. "Such articles" can not, therefore, mean the articles which it is intended to manufacture out of the raw materials. The construction given to the section in this respect is that which it has uniformly received in this court and in the circuit court in this circuit.

See also *United States* v. *Quantity of Rags*, Fed. Cas. No. 16103.

In *United States* v. *One Ice-box*, 37 F. (2d) 120 (N. D. Ill.), the Government sought forfeiture under Section 3453 of an ice box, bar, and other equipment of a saloon, on the ground that intoxicating liquors had there been possessed for sale

with intent to avoid payment of the tax thereon. The court decreed such forfeiture, and in its opinion said (pp. 122, 123):

> An analysis of the section discloses its comprehensiveness. It provides for the seizure and forfeiture under the conditions there stated of (1) the contraband goods; (2) all raw materials intended to be manufactured into contraband goods with intent to sell them in fraud of the revenue laws; and (3) "all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or enclosure where such articles or raw materials are found."
>
> Naturally and grammatically the words "articles" and "raw materials," respectively, as used in the third classification, refer to the contraband articles and contraband raw materials referred to in the first and second classifications. The plain and natural meaning of the language used is that all personal property in the same place where the contraband articles are found is the subject of forfeiture.
>
> * * * * *

Three days after the foregoing case was decided it was held in *In re Hurley*, 37 F. (2d) 397 (W. D. N. Y.), that Section 3453 permitted the forfeiture only of personal property (other than that upon which taxes are imposed) which is found in a place or building where *manufacturing* takes place.

In *United States* v. *Ten Bottles of Scotch Whiskey*, decided April 6, 1931 (p. 22, *infra*), the Circuit Court of Appeals for the Second Circuit, after referring to most of the cases discussed in this brief, held that the forfeiture provided for by the third clause of Section 3453 was not confined to personal property found in a place where taxable articles were manufactured, but extended to property found in places where such articles were sold or removed. In this regard the court said:

> It appears to us that to construe the clause in question as limited to cases of manufacture disregards the words "such articles" in the clause "in the place or building, or within any yard or inclosure where such articles or raw materials are found." Except for the earlier form of this provision in the Act of 1864 there seems to be no room for doubt. The section begins by condemning all "articles" on which taxes are imposed. It extends this by the next sentence to "raw materials" intended for the manufacture of "articles of a kind subject to tax," and concludes by including the tools, etc., in the place "where such articles or raw materials" may be. The apparent purpose was to cover the associates of manufactured articles as well as of raw materials; nor is there any antecedent reason to impute any difference. * * *
>
> * * * Hence we hold that property is confiscable when found in the same place or building as manufactured articles subject to tax.

The court declared, however, that the chattels must be in a part of the building occupied by the possessor of the illicit liquor, and, adding that such chattels must be "in a part associated in use with that where the liquors are possessed," it held the libel defective for failure to allege these facts with sufficient clarity. In reversing the decree of forfeiture with leave to the libelant to plead over, it reserved decision as to the necessity for showing that the chattels sought to be forfeited were in the custody of the possessor of the liquor, and, if so, that they were being used as ancillary to the unlawful possession.

In the instant case it is clear that the property described in the libel was found in that part of the building which was occupied and used by the possessor of the liquor for the illegal sale thereof, and that it was in the custody of such possessor and used by him as ancillary to the unlawful business. (R. 24–25, 26–32.) The only question involving the construction of Section 3453 which is presented, therefore, is whether that statute authorizes the forfeiture of property found in a place where taxable articles are sold in fraud of the internal revenue laws. The holding of the court below that the statute is not to be so construed is directly in conflict with that of the Circuit Court of Appeals for the Second Circuit in the *Ten Bottles of Scotch Whiskey case*, and other cases herein cited, and is supported only by the decision in *In re Hurley, supra*. We submit that the decision of the court below in the instant case is erroneous.

The respondent also contended before the Circuit Court of Appeals (1) that the prosecution of Lewis, the proprietor of the saloon, under the National Prohibition Act barred the forfeiture of the libeled property under Section 3453, and (2) that Section 3453 has been impliedly repealed because in direct conflict with Sections 22 and 25, Title II, of the National Prohibition Act. These contentions were not passed upon by the Circuit Court of Appeals. We submit that they are clearly without merit. See *Various Items of Personal Property* v. *United States*, No. 114, October Term, 1930, decided February 24, 1931; *United States* v. *One Ford Coupe*, 272 U. S. 321, 330, 331, 332.

CONCLUSION

This case involves a question of general importance in the administration of the National Prohibition Act and the internal revenue laws, which was incorrectly decided by the Circuit Court of Appeals. The decision is in direct conflict with that of another circuit court of appeals. The petition for certiorari should therefore be granted.

Respectfully submitted.

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APRIL, 1931.

APPENDIX A.

STATUTES INVOLVED

Section 3453 of the Revised Statutes (U. S. C., Title 26, Sec. 1185) provides as follows:

> All goods, wares, merchandise, articles, or objects, on which taxes are imposed, which shall be found in the possession, or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal-revenue laws, or with design to avoid payment of said taxes, may be seized by the collector or deputy collector of the proper district, or by such other collector or deputy collector as may be specially authorized by the Commissioner of Internal Revenue for that purpose, and shall be forfeited to the United States. And all raw materials found in the possession of any person intending to manufacture the same into articles of a kind subject to tax for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax; and all tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure where such articles or raw materials are found, may also be seized by any collector or deputy collector, as aforesaid, and shall be forfeited as aforesaid. The proceedings to enforce such forfeitures shall be in the nature of a proceeding in rem in the circuit court or district court of the United States for the district where such seizure is made.

Section 22, Title II, National Prohibition Act, c. 85, 41 Stat. 305, 314, 315 (U. S. C., Title 27, Sec. 34), provides:

> An action to enjoin any nuisance defined in this title may be brought in the name of the United States by the Attorney General of the United States or by any United States attorney or any prosecuting attorney of any State or any subdivision thereof or by the commissioner or his deputies or assistants. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. If it is made to appear by affidavits or otherwise, to the satisfaction of the court, or judge in vacation, that such nuisance exists, a temporary writ of injunction shall forthwith issue restraining the defendant from conducting or permitting the continuance of such nuisance until the conclusion of the trial. If a temporary injunction is prayed for, the court may issue an order restraining the defendant and all other persons from removing or in any way interfering with the liquor or fixtures, or other things used in connection with the violation of this Act constituting such nuisance. No bond shall be required in instituting such proceedings. It shall not be necessary for the court to find the property involved was being unlawfully used as aforesaid at the time of the hearing, but on finding that the material allegations of the petition are true, the court shall order that no liquors shall be manufactured, sold, bartered, or stored in such room, house, building, boat, vehicle, structure, or place, or any part thereof. And upon judgment of the court ordering such nuisance to be abated, the court may order that the room, house, building, struc-

ture, boat, vehicle, or place shall not be occupied or used for one year thereafter; but the court may, in its discretion, permit it to be occupied or used if the owner, lessee, tenant, or occupant thereof shall give bond with sufficient surety, to be approved by the court making the order, in the penal and liquidated sum of not less than $500 nor more than $1,000, payable to the United States, and conditioned that intoxicating liquor will not thereafter be manufactured, sold, bartered, kept, or otherwise disposed of therein or thereon, and that he will pay all fines, costs, and damages that may be assessed for any violation of this title upon said property.

Section 25 of the same Title (U. S. C., Title 27, Sec. 39) provides:

It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business

purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process.

APPENDIX B

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, APPELLEE

against

10 BOTTLES OF SCOTCH WHISKEY, ETC., THE National Cash Register Company, and Domestic Electric Company, Inc., appellants

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UNITED STATES OF AMERICA, APPELLEE

against

ONE ONE-QUART BOTTLE OF GLYCERINE, PARTLY filled, and the various other articles and items of personal property seized at premises No. 140 Livingston Street, Brooklyn, New York, as listed in the Annexed Schedule A, the National Cash Register Company, appellant

Before MANTON, L. HAND, and CHASE, Circuit Judges.

Appeals by the claimants from decrees for the libellant upon libels of forfeiture of the District Court for the Eastern District of New York.

Leo de Nave for the appellants.

J. Bertram Wegman for the appellee.

L. HAND, *Circuit Judge:* In the first case the United States filed a libel of information to forfeit chattels, seized at 1286 Bedford Avenue, Brooklyn, among which was "ice cube Frigidaire." At that place one Collins "possessed" and had "custody and control" of "distilled spirits, subject to the tax imposed thereon by Section 900 of the Revenue Act of 1926, and beer containing more than one-half of one per centum of alcohol." These Collins possessed for the purpose of selling in fraud of the Internal Revenue Laws "and with design to avoid the payment of said taxes." The chattels were found and seized "within the place and building where the spirits and beer were seized." The second libel alleged the seizure of another lot of chattels, among which was a cash register, at 140 Livingston Street, Brooklyn, where one Powell possessed certain liquor and beer with intent to defraud the revenue, and glycerine and alcohol to make gin for the same purpose. The chattels seized were "within the same place" as the liquor, beer, and raw materials. The owner of the Frigidaire in the first suit, and the cash register in the second, appeared, made claim, and excepted to the libels for insufficiency in law. The district judge overruled the exceptions, and decreed a forfeiture, the claimants not wishing to plead over.

In *In Re Hurley*, 37 Fed. (2d) 397, Judge Adler concluded that the clause in R. S., Sec. 3453, "all tools, implements, instruments, and personal property whatsoever," must be confined to chattels used in the manufacture of raw materials into taxable articles with intent to defraud the revenue, and the Ninth Circuit adopted that view in *Ryan v. U. S.*, 44 Fed. (2d) 951. This would dispose of the Col-

lins suit, though not that of Powell. Judge Powell held in *U. S.* v. *38 Barrels of Spirits*, Fed. Cas. 16470, that the articles seized must be used in aid of the unlawful purpose, but, as the case before him concerned manufacture, he had no occasion to say, and did not, whether the section applied when no manufacture took place. Judge Choate, in *U. S.* v. *16 Barrels of Distilled Spirits*, Fed. Cas. 16300, had before him a case involving the possession of finished spirits, possessed with intent to defraud the revenue, and he held that all personal property on the premises was confiscable, regardless of its connection with the unlawful purpose. He ameliorated the severity of the result by construing "place or building" as including only those parts of the premises occupied by the possessor of the liquor. In *U. S.* v. *One Ice Box*, 37 Fed. (2) 120, Judge Woodward held confiscable the paraphernalia of a purveyor of liquors, who was not engaged in manufacture, the articles seized being, however, all in his possession in that part of the premises occupied by him. The same section was under discussion in *U. S.* v. *A Quantity of Tobacco*, Fed. Cas. 16, 106, and *U. S.* v. *Distillery at Spring Valley*, Fed. Cas. 14963, but the point here at bar was not decided.

It appears to us that to construe the clause in question as limited to cases of manufacture disregards the words "such articles" in the clause, "in the place or building, or within any yard or inclosure where such articles or raw materials are found." Except for the earlier form of this provision in the Act of 1864 there seems to be no room for doubt. The section begins by condemning all "articles" on which taxes are imposed. It extends

this by the next sentence to "raw materials" intended for the manufacture of "articles of a kind subject to tax," and concludes by including the tools, etc., in the place "where such articles or raw materials" may be. The apparent purpose was to cover the associates of manufactured articles as well as of raw materials; nor is there any antecedent reason to impute any difference.

The Act of 1864 scarcely justifies the opposite view. Indeed, the clause was mere jargon, as originally enacted. It read as follows: "all tools * * * in the place of building * * * where such articles on which duties are imposed, as aforesaid, and intended to be used by them in the fraudulent manufacture of such raw materials, shall be found." "Intended to be used by them in the fraudulent manufacture of such raw materials" does indeed more naturally refer to "tools, implements," and "instruments," but the position of the clause does not permit of such attribution. Nor does it better the sense to assume a transposition of the clause, so as immediately to follow "property whatsoever." The best escape, though it does much violence to the language, is to read the phrase as meaning, "and raw materials intended to be used by them in the fraudulent manufacture of such articles," and this is the substance of the amendment of 1866, when the section took its present form. Apparently the words were at once recognized as meaningless, and we think that the second version is alone to be taken as expressing the authoritative intent of Congress. Hence we hold that property is confiscable, when found in the same place or building as manufactured articles subject to tax.

It does not follow that the libels are good. The association of the chattels seized with the illicit liquor is alleged only by inference. In Collins's case the libel alleged that "the premises 1286 Bedford Avenue" were within the Eastern District of New York; that Collins possessed the liquor "at the said premises"; and that the chattels seized were "in or within the same place and building" as the liquors. In Powell's case the allegations are in substance the same, except that the chattels are alleged to be "in or within the same place" as the liquors and raw materials. We adhere to the view of Judge Choate that the chattels must be in a part of the building occupied by the possessor of the illicit liquor, and we may add, in a part associated in use with that where the liquors are possessed. The opposite view would result in fantastic injustice which was certainly outside the purpose of the law. *Stowell* v. *U. S.*, 133 U. S. 1, concerned only a brewery, and it was necessary to decide no more than that the brewery was part of the same premises as the illicit distillery which had been set up within it. Upon exception we may perhaps read the libels as alleging that Collins or Powell occupied that part of the building where the illicit liquors were found, but it seems to us an undue extension to read the words "same place" as intended to mean that the other chattels were there as well. "Place" seems to have been used in the libels as the equivalent of the building at the street number mentioned, and it is consistent with the allegations that the chattels were anywhere in those buildings and that Collins or Powell were not in occupation of the part where they were. Hence, to

succeed the libels must be amended to declare that the place where the chattels were seized was also in occupation of the possessor of the liquors, and was not divorced in use from that where the liquor or raw materials themselves were possessed.

This will not necessarily be enough. We do not now decide whether in addition it must appear that the chattels were in custody of the possessor, and if so, that they were being used as ancillary to the unlawful purpose. No doubt when the libels are amended the pleader will declare himself fully as to both these matters; we reserve judgment, since the questions may not arise.

Decrees reversed and causes remanded with leave to the libellant to plead over.